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No. 87-953

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHRISTINA KONIZESKI, ET AL., PETITIONERS

v.

LIVERMORE LABS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. (Supp. III) 2212, which provides that the remedies available against the United States are the exclusive remedies for claims arising out of the federal government's atomic weapons testing program, violates separation of powers principles or the Takings Clause of the Fifth Amendment.

2. Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars claims that inadequate precautions were taken to protect the participants in the atomic weapons tests and that test participants were not later adequately warned of the possible dangers to which they had been exposed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 820 F.2d 982. The opinion of the United States District Court for the Northern District of California in *In re Consolidated United States Atmospheric Testing Litigation* (*Konizeski*) (Pet. App. 42-89) is reported at 616 F. Supp. 759. The opinion of the United States District Court for the Central District of California in *Broudy* v. *United States* (Pet. App. 90-95) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1987. A petition for rehearing with suggestion for rehearing en banc was denied on August 25, 1987 (Pet. App. 96-97). On November 19, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari

to December 8, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, Pub. L. No. 98-525, 98 Stat. 2646, codified at 42 U.S.C. (Supp. III) 2212, provides that, "for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States" (§ 2212(a)(1)), the remedies available against the United States shall be "exclusive of any other civil action or proceeding for the purpose of determining civil liability" (§ 2212(a)(2)). The statute further provides that the employees of such contractors "shall be considered to be employees of the Federal Government" within the meaning of the Federal Tort Claims Act (FTCA) (§ 2212(a)(2)), that suits filed against such contractors "shall be deemed a tort action brought against the United States" under the FTCA (§ 2212(b)), and that such suits "shall proceed in the same manner as any action against the United States" under the FTCA (§ 2212(a)(2)).

Congress enacted Section 2212 in response to the "flood of litigation" brought against contractors that "participated in the government's nuclear weapons tests." S. Rep. 98-500, 98th Cong., 2d Sess. 376-377 (1984).[1] Having been framed with "the obvious purpose of escaping the well-known limits on the government's waiver of sovereign

[1] As of December 14, 1987, contractors had been named as defendants in 58 cases, brought by over 3,000 plaintiffs, seeking damages totalling in excess of $4.9 billion.

immunity" (Pet. App. 15),[2] such suits were a source of serious practical and legal problems because the government was contractually committed to indemnify most contractors (see S. Rep. 98-500, *supra*, at 376) and because the suits "constitute[d] a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear[ed] the bad publicity generated by the suits" (Pet. App. 19).[3]

Section 2212 "clarif[ied] the status" of contractors involved in nuclear weapons testing to reflect Congress's belief that these contractors are "unique" (S. Rep. 98-500, *supra*, at 374). "[T]hese contractors," Congress found, "were utilized by the United States as instruments of national policy to assist in [an] entirely governmental task" (*id.* at 375). By statute, "only" the government can perform nuclear weapons research and development and test nuclear devices (*id.* at 375-376). Thus, "[o]nly the Government set[] the policy, ma[de] the decisions, and con-

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[2] Suits for injuries allegedly resulting from nuclear weapons tests were uncommon until the late 1970s. Initially, such suits invariably were directed against the government. However, commentators quickly recognized that the defenses available to the government under the FTCA were "more than likely to create insurmountable barriers to recovery." Note, *The Nevada Proving Grounds: An Asylum for Sovereign Immunity?*, 12 Sw. U.L. Rev. 627, 629 (1981). The first suggestion that contractors might be sued instead of the government proposed that strategy as a means of circumventing the FTCA's limitations. See Favish, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 Hastings L.J. 933, 962-963 n.109 (1981).

[3] See *Litigation Relating to Atomic Testing: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 42-45, 48-49 (1983) (testimony of George Dacey, President, Sandia National Laboratories, and William Degarmo, Laboratory Counsel, Lawrence Livermore National Laboratory).

trol[led] activities and circumstances regarding atomic weapon research, development, and testing" (*id.* at 375). Moreover, "[e]ach nuclear test that has been made since 1946 has been made under the statutory direction of Congress[,] * * * has been approved, before the fact, by the President[,] * * * [and] has been under the direct supervision of government officials" (*id.* at 376). While contractors "have provided scientific, engineering and technical support for nuclear tests carried out by the government," they "did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them" (*ibid.*). Therefore, Congress found (*ibid.*), there was no "question[] that these contractors were acting as the de facto instruments of the United States Government in carrying out a governmental purpose." It concluded that "[f]or the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government—not these contractors." S. Rep. 98-174, 98th Cong., 1st Sess. 374 (1983).

2. This case involves more than forty suits that were consolidated in the United States District Court for the Northern District of California and one suit that was brought in the United States District Court for the Central District of California and consolidated with the other suits on appeal to the Ninth Circuit. Petitioners assert claims for personal injury or wrongful death caused by exposure to radiation resulting from the detonation of atomic weapons. They are primarily persons (or the personal representatives of persons) who participated in atomic weapons tests conducted by the United States between the end of World War II and the adoption of the Partial Nuclear Test Ban Treaty in 1963; three claims are based on exposure to radiation in Hiroshima and Nagasaki. Most of

the persons exposed to radiation were members of the military at the time; four participated in atomic weapons tests as civilian employees of the government or of government contractors and one participated in tests first as a serviceman and then as a civilian. Pet. App. 42-44 nn.1 & 2; *id.* at 90. Eleven of the suits named the federal government as defendant, 28 suits were brought in state court against government contractors, and four suits named both the federal government and contractors as defendants.

a. The suits filed against contractors in state court were removed to the United States District Court for the Northern District of California. The court consolidated all suits pending before it involving claims arising out of atomic weapons tests, and, pursuant to Section 2212, substituted the government as defendant in cases brought against government contractors.

The district court rejected petitioners' arguments that Section 2212 is unconstitutional. It noted (Pet. App. 54) that, "[i]n adopting this legislation, Congress broke no new ground," comparing Section 2212 to the Swine Flu Act (42 U.S.C. (1976 ed.) 247b(k) (repealed 1978)), the Federal Drivers Act (28 U.S.C. 2679(b)-(e)), and various statutes making the FTCA the exclusive remedy for claims arising out of the conduct of government medical personnel (10 U.S.C. (& Supp. IV) 1089; 38 U.S.C. 4116; 42 U.S.C. 233). Indeed, the court concluded (Pet. App. 55) that "these consolidated actions present perhaps the most compelling case for substituting the government as the sole defendant" since they involve "activities conducted under the closest control of the government, undertaken on authority from the President, capable of being performed solely by the government and inextricably interwoven with national security." "A question as to the validity of the Act

arises," the court observed (*ibid.*), "solely because it applies to pending actions." See § 2212(c).

The district court rejected petitioners' argument that, insofar as it applies to pending cases, Section 2212 violates the Takings Clause of the Fifth Amendment. It pointed out that the relevant property interest—a pending civil suit—is "inchoate" and "contingent on successful prosecution to judgment" (Pet. App. 56-57). "That a cause of action may * * * be impaired or lost before final judgment" due to intervening legislation, the court stated (Pet. App. 57), has been "beyond question" ever since this Court's decision in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). Application of Section 2212 to pending claims does not violate the Takings Clause, the district court concluded (Pet. App. 65 (citations omitted)), since "the tort claims asserted here lack 'investment-backed expectations,' " are "contingent by their nature," and "arise in a field in which the law remains to be developed." In any event, the court concluded (*ibid.*), Section 2212 "does not abrogate [petitioners'] claims but subjects them to the tort claims procedure which the [petitioners] could reasonably expect might be applied."

Turning next to petitioners' argument that separation of powers principles preclude application of Section 2212 to claims that were pending on the date of its enactment, the district court held (Pet. App. 66) that, "[s]ince the Act neither directs the courts to make a certain finding of fact nor requires them to apply an unconstitutional law, the separation of powers doctrine is not offended." Section 2212, the court reasoned (*ibid.*), "does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but

it leaves the application of the rules of law, including any defenses, for judicial determination."[4]

The district court then dismissed all of the suits consolidated before it on the ground that the claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).[5] The district court concluded (Pet. App. 70-73) that, under *Dalehite* v. *United States*, 346 U.S. 15 (1953), where this Court held that the exception barred suits alleging that a disastrous explosion had been due to inadequate plans for the handling and shipping of fertilizer, petitioners' claims that inadequate safety precautions were taken at the atomic weapons test sites were plainly barred. With respect to the claims that the government breached a duty to warn of the hazards to which the test participants had been exposed, the court noted that in 1977 the government established a notification and examination program for test participants. The initial cost of the program was $6 million per year, the court observed (Pet. App. 77), and the program involved "difficult judgments balancing the magnitude of the risk from radiation exposure—of which there was only frag-

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[4] The district court also rejected arguments, now abandoned by petitioners, that Section 2212 violates the substantive and procedural components of the Due Process Clause and the Seventh Amendment. Pet. App. 55 n.6, 57 n.8, 63-64.

[5] In the alternative, the district court held that all of the suits arising out of exposure to radiation of servicemen are barred by the rule of *Feres* v. *United States*, 340 U.S. 135 (1950) (Pet. App. 81-87); that the suits arising in Japan, the Marshall Islands, or at Christmas Island are barred by the FTCA's foreign country exception, 28 U.S.C. 2680(k) (Pet. App. 87); and that the suits arising out of exposure to radiation in Hiroshima or Nagasaki at the end of World War II are barred by the FTCA's combatant activities exception, 28 U.S.C. 2680(j) (Pet. App. 88). These holdings were not addressed by the court of appeals. See Pet. App. 39 n.20.

mentary knowledge—against the risks and burdens of a public program." "The conclusion is inescapable," the court found (*id.* at 79), that the discretionary function exception precludes claims challenging the government's failure to undertake such a program sooner than it did.

b. Petitioner Broudy's wrongful death suit, which contended that the government had breached a post-discharge duty to warn her decedent of radiation dangers to which he had been exposed as a military participant in atomic weapons tests, was filed in the United States District Court for the Central District of California. Pet. App. 90-91. Adopting the reasoning of the opinion in the consolidated Northern District cases, the district court held (*id.* at 92-93) that the discretionary function exception barred that claim.

c. The court of appeals consolidated the appeals and affirmed (Pet. App. 1-41). For the most part, it adopted verbatim what it described (*id.* at 3) as the "well reasoned" opinion of the United States District Court for the Northern District of California. In addition, the court of appeals "added and adopted portions" (*id.* at 3 n.2) of the First Circuit's opinion in *Hammond* v. *United States*, 786 F.2d 8 (1986), which also rejected a constitutional challenge to Section 2212. See Pet. App. 17 ("adopt[ing] the *Hammond* court's cogent due process analysis").

A petition for rehearing and suggestion for rehearing en banc drew no votes.

ARGUMENT

1. Petitioners' primary contention is that Section 2212 cannot constitutionally be applied to lawsuits that were pending on the date of its enactment.[6] Relying on separa-

[6] This argument, of course, has no applicability to the 11 suits in which the government was originally named as the defendant.

tion of powers principles and the Takings Clause, petitioners argue that Congress cannot enact legislation impairing a legal claim once a complaint has been filed, and that the "purpose and effect" (Pet. 13) of Section 2212 is to do just that. Petitioners' argument is wholly without merit, and has been rejected by the two circuits—indeed, by all of the lower court judges—that have considered it.

a. To begin with, Congress clearly intended Section 2212 to apply to lawsuits that were pending on the date of its enactment, as well as to suits commenced thereafter. See 42 U.S.C. (Supp. III) 2212(c).[7] Section 2212 was enacted to "cause all litigation involving the atomic weapons testing program, including suits now filed against contractors, to be maintained against the United States under the substantive and procedural requirements of the FTCA" (S. Rep. 98-500, *supra*, at 375). Petitioners argue that Congress transgressed separation of powers principles by "chang[ing] the rule in pending cases" because the "ultimate consequence" of relegating their claims to the remedy provided under the FTCA "was to preclude any compensation" (Pet. 15). By couching their argument in separation of powers terms, petitioners presumably hope to distinguish the numerous cases in which this Court has stated that it is "clearly established that '[a] person has no property, no vested interest, in any rule of the * * * law' " (*Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978), quoting *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876)) and that the

[7] Since most of the lawsuits likely to be affected by Section 2212 have arisen, or are expected to arise, out of atomic weapons tests conducted more than 25 years ago (see S. Rep. 98-500, 98th Cong., 2d Sess. 376 (1984)), it would make little sense to limit the applicability of Section 2212 to suits filed after the date of its enactment.

"mere commencement of [a] suit" does not "operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid" (*United States* v. *Heinszen & Co.*, 206 U.S. 370, 387 (1907)). See also *McCullough* v. *Virginia*, 172 U.S. 102, 123-124 (1898) ("[l]egislation may act on subsequent proceedings, [and] may abate actions pending, but when those actions have been passed into judgment the power of the legislature to disturb the rights created thereby ceases").

Petitioners base their separation of powers argument on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). The issue in *Klein* was whether Congress could divest the federal courts of jurisdiction over a suit seeking compensation for property that had been seized during the Civil War. By statute, the claimant in such a suit was required to prove that he had remained loyal to the Union, and, in an earlier opinion, this Court had held that such loyalty could be proved by a Presidential pardon. However, after the plaintiff in *Klein* had received a favorable judgment in the Court of Claims, Congress passed legislation defining acceptance of a pardon as proof of disloyalty and directing the courts to dismiss for want of jurisdiction any claim based on a pardon. On appeal, this Court refused to apply the new legislation, holding that it "passed the limit which separates the legislative from the judicial power" and, by "impairing the effect of a pardon, * * * infring[ed] the constitutional power of the Executive" (80 U.S. (13 Wall.) at 147).

Contrary to petitioners' apparent belief (see Pet. 18), *Klein* "should surely not be read as casting doubt on the ancient principle, clear since the decision in [*The Schooner Peggy, supra*], that the courts are obligated to apply law (otherwise valid) as they find it at the time of final judg-

ment." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 316 n.4 (2d ed. 1973). Rather, *Klein* simply "establish[ed] the welcome if unsurprising proposition that Congress's power to limit federal court jurisdiction * * * is subject to limitations found elsewhere in the Constitution." D. Currie, *The Constitution in the Supreme Court, The First Hundred Years* 311 (1985). Thus, *Klein* teaches that legislation may be objectionable "in terms of the doctrine of separation of powers" either because it "impermissibly has disturbed the finality of a judicial decree by rendering * * * earlier judgments in [a] case mere advisory opinions" or because it has "prescrib[ed] a rule of decision that left the court no adjudicatory function to perform." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 391-392 (1980); see generally Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189.

In this case, the application of Section 2212 to claims that were pending when it was enacted raises no separation of powers concerns. As the court below found (Pet. App. 22), "Section 2212 does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases." Unlike the situation in *Klein*, the statute that petitioners challenge "substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination" (*ibid.*). The independence of the federal courts plainly is not threatened where, as here, new laws are entrusted to their application. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981). Accordingly, if, as petitioners argue, a constitutional question arises because of the effect that Section 2212 has on pending suits, that question must find its source in con-

stitutional limitations which operate independently of separation of powers principles.

b. Petitioners purport to find such a constitutional limitation in the Takings Clause, arguing (Pet. 19) that applying Section 2212 to their pending lawsuits "effects a taking of Petitioners' property without compensation." There is no "set formula for identifying a 'taking,' " but this Court has "identified three factors which have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986) (quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)). The court below properly made the " 'essentially ad hoc, factual inquir[y]' " required in evaluating these factors, and correctly concluded that neither the "nature of the property right" here asserted nor the character of the "governmental action" supports the claim that Section 2212 effects a taking. Pet. App. 15 (quoting *Penn Central*, 438 U.S. at 124).

Initially, it must be noted that petitioners do not seriously contest (see Pet. 23-24) the court of appeals' conclusion (Pet. App. 15) that they had no "investment-backed expectations" in the "property"—petitioners' tort claims against the contractors—that Section 2212 allegedly "takes." Petitioners nonetheless insist (Pet. 19) that their causes of action were property and that (*id.* at 23) Section 2212 "has entirely destroyed the value" of their claims. But even if "a cause of action is a species of property," there can be no doubt that Congress may "eliminate * * * causes of action altogether." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428, 432 (1982). At least " 'until a final unreviewable judgment is obtained,' " a claim for damages

is "contingent." Pet. App. 14-15 (quoting *Hammond*, 786 F.2d at 12). This kind of "interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979). Moreover, "[i]t hardly need be said that predicting the outcome of any damage suit—both with respect to liability and the amount of damages—is hazardous." *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 7 n.9.[8] Coupled with the fact that the law is always subject to " 'amendments to achieve the legislative end' " (*Connolly*, 475 U.S. at 227, quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958)), it is clear that petitioners had nothing more than an inchoate " 'unilateral expectation' " in the claims they had asserted, which is insufficient to implicate the Takings Clause (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980)).

We know of no case in which the effect of intervening legislation on a pending lawsuit has been deemed a taking.[9] Moreover, "[g]iven the propriety of the govern-

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[8] It may well be that petitioners' claims (or at least the claims of those petitioners who were servicemen) against the contractors are barred under the military contractor defense which has been recognized by many circuits. See, *e.g.*, *McKay* v. *Rockwell International Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). In *Boyle* v. *United Technologies Corp.*, No. 86-492 (argued Oct. 13, 1987), this Court currently has before it the question whether, and under what circumstances, military contractors should be protected by such a defense. Insofar as this defense is applicable, then, even assuming that a taking occurred, Section 2212 took nothing of value from petitioners. Since none of the courts below based their conclusions on the likelihood that petitioners' claims against the contractors would be barred (or even mentioned the military contractor defense), there is no reason to hold this case for *Boyle*.

[9] Petitioners' citation of *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913), is inapt. There the Court required a remedy for harm from a

mental power to regulate, * * * * * it would be surprising indeed to discover" that a takings issue has lurked unseen in past instances where a change in law has affected pending lawsuits (*Connolly*, 475 U.S. at 223). By comparing (Pet. 20) the suits they filed to the liens that were held to have been taken in *Armstrong* v. *United States*, 364 U.S. 40 (1960), petitioners inadvertently underscore a fundamental reason why their takings argument is misconceived: unlike a lien, the mere filing of a lawsuit gives a claimant no vested interest in "specific property" (*id.* at 44). Governmental action that extinguishes a pending lawsuit thus "takes" no property. Indeed, any other conclusion would produce an anomaly, since it is clear that Congress can create a " 'liability based on past acts,' " thus " 'upset[ting] otherwise settled expectations,' " without effecting a taking. *Connolly*, 475 U.S. at 223 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976)).

Petitioners in fact concede (Pet. 26-27) that intervening legislation can constitutionally "change the rule of decision in accrued causes of action." Their attempt (*ibid.*) to limit this concession to situations in which such changes

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physical intrusion upon real property by ordering application of a statute authorizing suit which had been repealed after the physical intrusion at issue. The Court expressly distinguished the case from tort actions, such as this, stating: "In the instant case the action is neither for a tort, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made" (228 U.S. at 157-158). Insofar as the intrusion in *Ettor* constituted a taking of property, it is clear, especially following this Court's decision in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, No. 85-1199 (June 9, 1987), that compensation for that wrong was constitutionally required. There is no such constitutional requirement of compensation for torts such as those alleged by petitioners here.

"could reasonably have been anticipated," are "curative," or "merely substitute one remedy for another" fails to distinguish this case. Section 2212 plainly is "curative" legislation. It is perfectly clear that suits against parties other than the government alleging negligent performance of atmospheric atomic weapons tests are designed to circumvent the limitations on the immunity of the United States (see note 2, *supra*), and thus Section 2212 simply subjects petitioners "to the tort claims procedure which the [petitioners] could reasonably expect might be applied" (Pet. App. 15). Moreover, while it is true that *these* petitioners have found the FTCA remedy unavailing, Section 2212(a)(2) does substitute a remedy, a suit under the FTCA, for the claims against contractors that petitioners had asserted. And the discretionary function exception would *not* bar claims for "run-of-the-mine accidents" (*Dalehite* v. *United States*, 346 U.S. 15, 28 n.19 (1953)) for which the government's contractors may have been responsible.[10]

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[10] Petitioners correctly note (Pet. 8 n.5) that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), also applies to preclude the suits of those petitioners who were exposed to radiation while in military service, and that other FTCA exceptions will preclude various claims too. Whether such barriers to successful prosecution of an FTCA claim in fact make that remedy less generous than a suit against a contractor is questionable. See note 8, *supra*. In any event, Congress has enacted several pieces of legislation to provide compensation to veterans injured by in-service exposure to radiation. See Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725; Veterans' Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, § 102(a)(2), 95 Stat. 1047-1048; Veterans' Health Care Amendments of 1983, Pub. L. No. 98-160, § 601, 97 Stat. 1006-1008. Petitioners' complaint (Pet. 23 n.9) that they have been denied benefits under such programs simply reflects the fact that, even when judged under the lenient standards applicable to claims for veterans' disability benefits, there is insufficient scientific evidence to support the conclusion that participants in the atomic weapons tests were exposed to hazardous amounts of radiation. See S. Rep. 100-215, 100th Cong., 1st Sess. 91-110 (1987).

2. Petitioners also present the question whether the discretionary function exception, 28 U.S.C. 2680(a), was correctly applied in this case. However, petitioners note (Pet. 28) that this case "poses substantially the same legal issues * * * pertaining to the application of the discretionary function exception in the context of the United States atmospheric testing program" that were raised by the petition for a writ of certiorari in *Allen* v. *United States*, No. 87-316, and request (Pet. 28) "that this case be held for appropriate disposition in light of the outcome in that case." Since this Court denied the *Allen* petition on January 11, 1988, the appropriate disposition here in light of *Allen* is to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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